

June 20, 2000

Against Kennedy's Hate-Crimes Amendment

This afternoon, the Senate will vote, first, on Senator Hatch's amendment and then on Senator Kennedy's hate-crimes amendment. Unlike the Hatch amendment, the Kennedy amendment will create new Federal hate crimes. Since every member of the United States Senate opposes hate crimes, why isn't the Kennedy amendment getting unanimous support? There are many reasons, but consider the following:

The Kennedy amendment is discriminatory. It divides crime victims and their families into various classes depending, mostly, on what the accused said during the crime.

The Kennedy amendment is divisive. Because the amendment discriminates, it divides Americans into racial, ethnic, and other categories. Just this morning, our attention was drawn to a column about a vicious crime that occurred in South Carolina last October where a gang of young men chased down and brutally beat two 35-year-old men. The gang and the victims were of different races. The column asked if the case would have been handled differently if the races had been reversed. The Kennedy amendment encourages this kind of thinking, setting American against American in arguments about race and motive.

The Kennedy Amendment is incongruous. It focuses on a tiny, tiny fraction of all crimes to the exclusion of all others. Hate crimes constituted something like one one-hundredth of one percent of all crimes in the latest year for which data are available. The Kennedy amendment cannot be confused with an anti-crime initiative.

The Kennedy amendment is unnecessary. We hear over and over again about the brutal murders of James Byrd and Matthew Shepard. What we hear much less often is the fact that the murderers in both cases already have been brought to justice by the States of Texas and Wyoming, and that the murderers of James Byrd have been sentenced to death. Senator Kennedy seems to believe that these two prompt, successful prosecutions in the States demonstrate the need for new Federal laws.

The Kennedy amendment cancels the death penalty. If the killers of James Byrd had been prosecuted under the Kennedy amendment they would not have been subject to capital penalties. The Kennedy amendment provides that if death results from a hate crime that the offender "shall be imprisoned for any term of years or for life." Sec. __07—"§249(a)(1)(B) & (a)(2)(A)(ii)". The death penalty is not provided for. The irony is, that Senator Kennedy — unlike the majority of the American people — seems to believe that it is more important to brand a vicious murderer as "a hater" than to send him to death row.

The Kennedy amendment unnecessarily “federalizes” more crimes. Remarkably, this attempt is being made during the very week in which a civil trial got underway that will determine the liability of the Federal Government in the Waco, Texas Branch Davidian disaster. One would think that there might be some reluctance about giving Janet Reno’s Justice Department more power and more discretion to prosecute crimes.

The Kennedy amendment includes “sexual orientation” which is a highly controversial issue. A majority of the States do *not* now cover sexual orientation in hate-crimes laws, and the Kennedy amendment would overturn those deliberate policies. Of all the concerns about including sexual orientation in a Federal hate-crimes law, perhaps none is more important than the tendency of Senator Kennedy and others to confuse the moral status of sexual orientation and race. On this subject, it is hard to improve on General Colin Powell’s response to former Congresswoman Pat Schroeder during the debate on homosexuals in the military:

“[S]he had her logic wrong. ‘Skin color is a benign, nonbehavioral characteristic,’ I pointed out. ‘Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument.’

“The linking of gay rights and the civil rights movement got a mixed reaction in the African-American community. The Congressional Black Caucus favored removing the ban on homosexuals in the armed services. But other African-American leaders were telling me that they resented having the civil rights crusade appropriated — hijacked, some of them put it — by the gay community for its ends. I heard from black clergymen who adamantly opposed removing the ban. . . .” Colin L. Powell, *MY AMERICAN JOURNEY*, p. 547 (1995).

The Kennedy amendment is going to create vast problems for sex crimes. The amendment defines a hate crime as (among other things) any serious crime committed “because of the gender of any person.” If enacted, this provision is going to entwine the Federal Government in difficult and controversial and possibly numerous problems. The Kennedy amendment does not, as the Violence Against Women Act did, require that a relevant act be motivated “at least in part” by an “animus based on the victim’s gender.” 42 USC §13981(d). The Kennedy amendment opens the door for defining all sex crimes as hate crimes. In the highly publicized case that found its way to the Supreme Court (see below), the lower courts found that the accused’s announcement that he liked to get women drunk and have sex with them was sufficient to show that he harbored an animus based on the victim’s gender.

The Kennedy amendment is unconstitutional. Senator Hatch made the constitutional argument eloquently on the Senate floor yesterday. Since the Supreme’s Court’s May 15, 2000 decision in *United States v. Morrison*, 120 S. Ct. 1740, the constitutionality of the Kennedy amendment has been suspect because Congress lacks the constitutional authority to enact such a statute. As Senator Hatch pointed out, the Kennedy amendment has serious problems under the Commerce Clause, section 5 of the Fourteenth Amendment, and the First Amendment. The ACLU has written to Senators expressing its concerns about First Amendment questions raised by the Kennedy amendment.

Staff Contact: Lincoln Oliphant, 224-2946